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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DERWIN JULES JACKSON,

Defendant and Appellant.

E072766

(Super.Ct.Nos. FSB11452 &
WHCJS1800321)

OPINION

APPEAL from the Superior Court of San Bernardino County. Gregory S. Tavill.

Affirmed in part, remanded with directions in part.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, David E. Madeo and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

In 1997, a jury convicted defendant and appellant Derwin Jules Jackson of two counts of second degree murder (Pen. Code,¹ § 187, subd. (a)) and found that a principal was armed with a firearm (§ 12022, subd. (a)(1)) as to both murders. After defendant waived his right to a jury trial on the truth of his prior conviction, the trial court found true that defendant had suffered a prior conviction for shooting at an occupied motor vehicle in violation of section 246.² The trial court treated the prior conviction as a prior strike (§ 1192.7, subd. (c)(8)), and sentenced defendant to a total term of 62 years to life in state prison as follows: 15 years to life, doubled to 30 years to life due to the prior conviction, for each count of murder, plus one year for each firearm enhancement. The court also ordered defendant to pay a \$10,000 restitution fine under section 1202.4.

In August 2018, defendant filed a petition for writ of habeas corpus in the superior court challenging the prior conviction. The court granted defendant's petition and ordered defendant to be resentenced "as if his prior conviction . . . was not a strike." Defendant was resentenced to 32 years to life in state prison. At the resentencing hearing, defendant asked the trial court to strike the firearm enhancements under Senate Bill No. 620. The court responded by stating Senate Bill No. 620 did not apply to the firearm enhancement at issue in this case. Defendant also requested the court to strike the

¹ All future statutory references are to the Penal Code unless otherwise stated.

² We take judicial notice of the record on appeal from defendant's pending appeal in case No. E072464 pursuant to Evidence Code section 452.

finest and fees under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) because he lacked the ability to pay. The court denied the request, noting it lacked jurisdiction based on the language of the order granting the petition for writ of habeas corpus.

On appeal, defendant argues (1) the resentencing court mistakenly believed it lacked discretion to dismiss the firearm enhancements, and (2) the court erred by finding any issue regarding his ability to pay the fines and fees was outside the scope of its jurisdiction. Defendant requests this court to remand the matter to provide the lower court an opportunity to address both issues. To the extent the merits of this case are reached based on the outcome of the People’s appeal in case No. E072464, the People agree that a “remand appears warranted” in this case and that “nothing precluded the superior court from addressing the *Dueñas* issue.” As to the first issue, the People assert “although the record does not affirmatively show that the superior court believed it lacked the discretion to dismiss the firearm enhancements, any ambiguity will be resolved by allowing the court to revisit the issue when it decides the *Dueñas* issue on remand.” We agree with the parties and remand the matter to allow the trial court to address both issues in the first instance.

II

FACTUAL BACKGROUND

On the night of June 23, 1996, codefendant Rodrick Blackburn “shot and killed two teenage boys, for no apparent reason other than that he ‘hate[d] Mexicans.’” (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1524.) There was testimony during

defendant's criminal trial that he "encouraged Blackburn to shoot the teenagers," and that "[w]hen the shooting was over, [defendant] drove Blackburn away." (*Ibid.*)

III

DISCUSSION

A. *Senate Bill No. 620*

After the trial court granted habeas relief to defendant with respect to his prior conviction "as if his prior strike conviction was not a strike," at the subsequent resentencing hearing, defense counsel asked the court to strike the firearm enhancements under Senate Bill No. 620. In response to the request, the court asked, "Does the Court have any more discretion now than they did then?" After defense counsel responded affirmatively, the court stated, "SB 620 addresses 12022.5 and 12022.53. It does not address 12022(a)(1)." Defense counsel argued that the failure to apply Senate Bill No. 620 to section 12022, subdivision (a)(1), would violate equal protection. The court stated it understood defendant's argument but did not "buy it."

Citing *People v. Jones* (2007) 157 Cal.App.4th 1373, 1378 (*Jones*), defendant argues remand is required for the trial court to knowingly exercise its discretion to strike or stay the punishment on the principal armed with a firearm (§12022, subd. (a)) enhancements because the court mistakenly believed it lacked discretion to do so. The People assert "the record fails to affirmatively show the superior court actually believed it lacked discretion to strike [defendant's] firearm enhancements. Nevertheless, the court should be given an opportunity to address the issue upon remand because . . . the case

should be remanded so that the court can address the *Dueñas* issue.” We accept the People’s concession.

Senate Bill No. 620 allows the trial court to exercise discretion with respect to striking firearm enhancements. When sentencing defendant in January 1998, the trial court lacked the authority to strike firearm enhancements. (See, e.g., *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362-1363, citing former § 12022.53, subd. (h).)

However, since defendant’s sentencing, the Legislature passed Senate Bill No. 620, which became effective January 1, 2018. (Sen. Bill No. 620 (2017-2018 Reg. Sess.)) This bill amended sections 12022.5 and 12022.53 to give trial courts discretion, “in the interest of justice pursuant to Section 1385,” to “strike or dismiss an enhancement otherwise required to be imposed” by those statutes (former § 12022.5, subd. (c), as amended by Stats. 2017, ch. 682, § 1, former § 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.) The discretion conferred by the statute “applies to any resentencing that may occur pursuant to any other law.” (*Ibid.*)

We agree with other courts that the amendments to sections 12022.5 and 12022.53 apply retroactively to cases not yet final on appeal. (See, e.g., *People v. Vela* (2018) 21 Cal.App.5th 1099, 1113-1114, citing *In re Estrada* (1965) 63 Cal.2d 740, 742-748 [courts presume that absent evidence to the contrary, the Legislature intends an amendment reducing punishment under a criminal statute to apply retroactively to cases not yet final on appeal]; *People v. Brown* (2012) 54 Cal.4th 314, 324-325 [retrospective application of a new penal statute is an exception to the general rule set forth in section 3, which bars

retroactive application of new Penal Code statutes unless the Legislature has expressly provided for such application]; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091; *People v. Hurlic* (2018) 25 Cal.App.5th 50, 56.) As explained in *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507, “a statute which lessens the penalty for a crime gives rise to an inference the Legislature intended the change to apply to all nonfinal cases. [Citations.] Provisions which give trial courts discretion to reduce a sentence previously required by the Penal Code are nonetheless changes which benefit offenders who committed particular offenses or engaged in particular conduct and thereby manifest an intent by the Legislature that such offenders be given the benefit of that discretion in all cases which are not yet final.”

In addition to the discretion which the Legislature provided trial courts, as previously noted, section 12022.53, subdivision (h), states that “[t]he authority provided by this subdivision *applies to any resentencing that may occur pursuant to any other law.*” (Italics added.) By its express terms, this provision extends the benefits of Senate Bill No. 620 to defendants who have exhausted their rights to appeal and for whom a judgment of conviction has been entered but who have obtained collateral relief by way of a state or federal habeas proceeding. We interpret this extension of Senate Bill No. 620 as an expression by the Legislature of its understanding that it would also be applied to all cases which were not final at the time it became effective. In the present case, defendant filed his petition for writ of habeas corpus in the superior court on

August 30, 2018. The superior court granted defendant's habeas petition on March 15, 2019.

Furthermore, although Senate Bill No. 620 does not specifically mention section 12022, “[i]t is well established that, as a general matter, a court has discretion under section 1385, subdivision (c), to dismiss or strike an enhancement, or to “strike the additional punishment for that enhancement in the furtherance of justice.” [Citation.]” (*Jones, supra*, 157 Cal.App.4th at pp. 1378-1379, fn. omitted [court erred in determining it lacked discretion to strike deadly weapon enhancement under section 12022, subd. (b)(1)].) Where the “court operated under the erroneous belief that it lacked discretion to strike the enhancement,” we must reverse and remand the matter to permit the court to determine whether to exercise its discretion under section 1385 to strike the enhancement or impose sentence on it. (*People v. Meloney* (2003) 30 Cal.4th 1145, 1151.)

“Remand for resentencing is not required, however, if the record demonstrates the trial court was aware of its sentencing discretion. [Citations.] Further, remand is unnecessary if the record is silent concerning whether the trial court misunderstood its sentencing discretion. Error may not be presumed from a silent record. [Citation.] “[A] trial court is presumed to have been aware of and followed the applicable law.” [Citations.]’ [Citation.]” (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228-1229.) “[I]t is the appellant’s burden to affirmatively demonstrate error. [Citation.]” (*People v. Cardenas* (2015) 239 Cal.App.4th 220, 227.)

In *Jones*, with respect to striking the section 12022, subdivision (b)(1) enhancement, the court explicitly stated “it lacked discretion to do so.” (*Jones, supra*, 157 Cal.App.4th at p. 1378.) In *People v. Wilson* (2002) 95 Cal.App.4th 198, “the trial court expressly stated it believed it had no discretion to strike the sentence enhancement.” (*Id.* at p. 203 [judgment reversed and remanded for court to exercise its discretion whether to strike an enhancement for use of an accelerant attached to an arson offense].) On “an ambiguous record, it is appropriate to remand the matter to the trial court to consider the matter under the correct standard, to the extent it has not already done so.” (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1021.)

Based on the foregoing, we shall remand the matter for resentencing by the trial court in full awareness of its discretion whether to strike the firearm enhancements. We express no opinion as to whether the enhancement should be stricken or imposed.

B. *Ability to Pay Fines and Fees*

At May 7, 2019 resentencing hearing, defense counsel also asked the trial court “to consider striking the fines and fees because [defendant] has an inability to pay them.” The trial court responded, “[i]t’s beyond the scope of the writ. It wasn’t part of what I had.”

Defense counsel then stated, “I believe that upon granting the writ, though, and vacating part of the sentence, the Court has to fully resentence [defendant]. So, at this point, the sentence would be reopened for that purpose. [¶] I believe the Court should exercise its discretion under *Dueñas* . . . and strike the fines and fees.” The prosecutor

objected, arguing it is outside the scope of the writ petition. The trial court agreed, finding “[i]t’s beyond the scope of the writ.”

The court explained: “Like I said, I think that my jurisdiction today is limited by what was ordered in the writ. And what was ordered in the writ was simply to change the number of years, as if [defendant] did not have a prior strike. [¶] What I do today is without prejudice to Judge Christianson deciding the [section] 1170.95 petition. Which, you know, from my reading, there are things to talk about in that petition the way it’s written. But it’s not before me today. So I’m not going to go there. [¶] In terms of the findings made by Judge Christianson, all of those findings that were made on January 30, 1998, all those findings were final a long time ago. I’m not going to revisit those. They were not part of the writ, it was not part of the relief that was sought; so I’m not going there.” Thereafter, the court sentenced defendant on each murder count to a term of 15 years to life plus an additional year for the firearm enhancement, for a total sentence of 32 years to life with 8,436 days of credit for time served.

Citing *Dueñas, supra*, 30 Cal.App.5th 1157, defendant argues the \$10,000 restitution fine, as well as any other fees, fines, and assessments, should be stricken subject to a showing that he has the present ability to pay. Defendant also asserts the resentencing court erred in finding the issue was outside the scope of the writ order and requests a remand for the trial court to properly exercise its discretion. The People concede a remand is appropriate on this issue as well and agree with defendant’s

contention that the resentencing court erred by failing to address the *Dueñas* issue. We also agree. (See *People v. Castellano* (2019) 33 Cal.App.5th 485, 490 (*Castellano*).)

As the People observe, this is not a case in which a remittitur from a higher court was issued. In such cases, “[w]hen there has been a decision on appeal, the trial court is reinvested with jurisdiction of the cause, but only such jurisdiction as is defined by the terms of the remittitur. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void.” (*People v. Dutra* (2006) 145 Cal.App.4th 1359, 1366 (*Dutra*), citing to *Stafford v. Municipal Court* (1960) 180 Cal.App.2d 368, 370-371.) “Where a reviewing court reverses a judgment with directions . . . the trial court is bound by the directions given and has no authority to retry any other issue or to make any other findings. Its authority is limited wholly and solely to following the directions of the reviewing court.” (*Dutra*, at p. 1367.) Rather, here the lower court was the resentencing court itself, not a higher court, that granted defendant the habeas relief.

In any event, the order granting defendant writ relief did not preclude consideration of the *Dueñas* issue. Instead, the superior court’s order merely stated that defendant was to “be resentenced” as if his “prior strike conviction was not a strike.” At a resentencing hearing, a trial court is entitled to reconsider its sentencing choices, and the defendant is restored to his original position as if he had never been sentenced and is entitled to the procedures and rights available at the time the judgment is pronounced. (See *People v. Kelly* (1999) 72 Cal.App.4th 842, 845 [when a resentence is ordered, the

court is entitled to reconsider all of its sentencing choices, subject only to the limitation that defendant not be sentenced to a greater aggregate term than the first sentence].) Thus, there was no basis for the resentencing court to decline to address the *Dueñas* issue as “beyond the scope” of the habeas order.

In the *Dueñas* case, the Court of Appeal, citing due process and equal protection principles, held that the assessments under Government Code sections 70373 and 1465.8 may be “imposed only on those with the means to pay them” (*Dueñas, supra*, 30 Cal.App.5th at pp. 1168-1169), and “that although the trial court is required by Penal Code section 1202.4 to impose a restitution fine, the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay” (*id.* at p. 1172).

Here, because the resentencing court did not address the *Dueñas* issue in the first instance, we will remand the matter to allow the court to address the issue. (*Castellano, supra*, 33 Cal.App.5th at pp. 489-490 [following *Dueñas* but clarifying that “a defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court”].)

IV

DISPOSITION

The judgment is affirmed. The matter is remanded for resentencing to allow the trial court to exercise its discretion whether to strike the firearm enhancements and to

allow defendant to request a hearing to determine his ability to pay the restitution fine,
and any fees and assessments, imposed by the trial court.

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CODRINGTON
J.

We concur:

MILLER
Acting P. J.

FIELDS
J.